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Supreme Court of the United States

OCTOBER TERM, 1948

No. 413

GEORGIA RAIL ROAD & BANKING COMPANY, *Appellant*,

v.

DOWNING MUSGROVE, *Who is State Revenue Commissioner of the State of Georgia, Appellee.*

Appeal from the Supreme Court of the State of Georgia to the Supreme Court of the United States

MOTION TO SUBSTITUTE CHARLES D. REDWINE FOR DOWNING MUSGROVE AS APPELLEE.

JAMES E. HARPER, Augusta, Ga.,
W. INMAN CURRY, Augusta, Ga.,
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Counsel for Appellant.

Foote & Davies, Inc., Atlanta, Ga.

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v.

DOWNING MUSGROVE, *Who is State Revenue Commissioner of the State of Georgia, Appellee.*

Appeal from the Supreme Court of the State of Georgia to the Supreme Court of the United States

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MOTION TO SUBSTITUTE CHARLES D. REDWINE FOR DOWNING MUSGROVE AS APPELLEE.

Now comes *Georgia Rail Road & Banking Company,* appellant in the above case, (and which will be referred to hereinafter as appellant), and moves this Court to substitute as appellee in this case Charles D. Redwine, who is now State Revenue Commissioner of the State of Georgia, for Downing Musgrove, who was State Revenue Commissioner of the State of Georgia when this case was decided by the Supreme Court of the State of Georgia, when the appeal of

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this case was allowed on October 13, 1948, from said State Supreme Court to this Court, and when this case was docketed in this Court on November 13, 1948.

This motion is based upon the following showing:

1. Said Downing Musgrove resigned as State Revenue Commissioner of the State of Georgia on November 15, 1948, and said Charles D. Redwine is now the duly appointed, qualified and acting State Revenue Commissioner of the State of Georgia, his appointment to that office by the Governor of Georgia, his acceptance of the appointment, his qualification as State Revenue Commissioner of the State of Georgia, and his entering upon the duties of that office having all taken place on November 17, 1948.

2. Appellant has called upon said Charles D. Redwine to state whether or not, unless enjoined, he will adopt or continue the action of his predecessors in seeking to enforce against appellant (a) the Act of the General Assembly of Georgia, approved February 28, 1874, and found in Georgia Laws 1874, pages 107 et seq., and (b) Article I, Section III, Paragraph III of the Constitution of Georgia of 1945, (which laws are charged by appellant in this suit to be in violation of the contracts clause, Article I, Section 10, Paragraph 1, of the Constitution of the United States, for the reason that they seek to nullify the tax limitation contained in Section 15 of appellant's legislative charter of 1833), by attempting to collect from appellant the ad valorem taxes to prevent the collection of which this suit seeks injunction, and thus pursue the effort to collect said taxes which M. E. Thompson, the original defendant in this suit initiated when he was State Revenue Commissioner of the State of Georgia and would have carried out had this suit not been brought and had he not been restrained by the restraining order issued in this suit, and which effort Glenn S. Phillips would have carried out except for this suit and said restraining order, (said Phillips having succeeded said Thompson as State Revenue Commissioner of the State of Georgia and having been substituted for him as a party to this suit),

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and which effort said Musgrove would have carried out except for this suit and said restraining order, (said Musgrove having succeeded said Phillips as State Revenue Commissioner of the State of Geo.gia and having been substituted for him as a party to this suit).

3. Said Charles D. Redwine has informed appellant that, upon advice of the Attorney General of the State of Georgia, he refuses to state whether or not, unless enjoined, he will adopt or continue the said action of his said predecessors and proceed to collect said taxes.

4. Appellant charges that such refusal is itself tantamount to a threat by said Charles D. Redwine to adopt or continue the said action of his said predecessors,—action designed to enforce laws which appellant avers to be in violation of the Constitution of the United States.

5. Appellant charges that said Charles D. Redwine (notwithstanding said refusal on said advice to state his position) has in fact determined to adopt or continue the said action of his said predecessors and to proceed to collect said taxes, and appellant further charges that said Charles D. Redwine, unless enjoined, will so proceed.

6. Said Charles D. Redwine has likewise refused, on advice of said Attorney General, to assent to being substituted for said Downing Musgrove as appellee in this case.

7. This Court can look to State law for power to substitute as appellee said Charles D. Redwine for said Downing Musgrove. *Ex parte La Prade*, 289 U. S. 444; *Gorham Mfg. Co.* v. *Wendell, State Comptroller of New York et al.*, 261 U. S. 1.

The applicable Georgia statute is the Act of the General Assembly of Georgia, approved March 20, 1941, and published in Georgia Laws 1941, pages 516 et seq., a copy of said Act being attached hereto as Appendix I. See *Cox* v. *Linder, Commissioner*, 191 Ga. 790, at page 792; 14 S. E. 2d 93, at page 94, a suit seeking an injunction against a State officer as a wrongdoer to prevent his enforcing an

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allegedly unconstitutional law, in which the Supreme Court of the State of Georgia (the highest court of the State), on the basis of said Georgia substitution statute, substituted a successor officer as defendant in error, the original defendant in error having gone out of office while the case was pending in said State Supreme Court. (The record in said State Supreme Court in Cox v. Linder, Commissioner, supra, shows that the motion for substitution, made on behalf of the successor officer by the then Attorney General and an Assistant Attorney General, and predicated upon said Georgia substitution statute, was consented to by counsel for plaintiff in error, but the fact of consent is of no consequence. Consent cannot furnish power to effect a substitution of parties. *Shaffer* v. *Howard, Auditor of The State of Oklahoma et al.*, 249 U. S. 200, 201; *The Pullman Company* v. *Croom, Comptroller of the State of Florida*, 231 U. S. 571. The State Supreme Court's power to make the substitution was derived from the substitution statute and this was recognized by the State Supreme Court by its not having mentioned the consent and by its showing in its statement of the case that the successor had been made a party in accordance with the substitution statute.) It is plain, therefore, that under State law this Court has power, upon the showing made by appellant in this motion, to substitute as appellee in this case said Charles D. Redwine for said Downing Musgrove.

8. Moreover, even if power to make said substitution were not furnished by State law, said substitution can be made pursuant to this Court's Rule 19, Paragraph 4 (which is now supported by this Court's broad rule making power (see Reviser's Notes to Section 2071 of new Title 28, United States Code), in view of repeal of Section 11 of the Act of February 13, 1925, by the Act of June 25, 1948; see new Title 28, United States Code, Congressional Service, issued July 1948, Schedule of Laws Repealed, at page 1661). As to substituting a successor wrongdoer, see *Allen, Collector*

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of Internal Revenue for the District of Georgia, v. *Regents of University System of Georgia*, 304 U. S. 439.

9. Service of this motion has been made upon said Charles D. Redwine and upon counsel of record for appellee, including the Attorney General of the State of Georgia.

WHEREFORE, having shown that there is a substantial need for continuing and maintaining this case and obtaining an adjudication of the questions involved, appellant prays:

(a) That this Court order said Charles D. Redwine to show cause by response to this motion within such reasonable time as this Court may fix why he should not be substituted as appellee in this case for said Downing Musgrove;

(b) That this Court order that said Charles D. Redwine in his response to this motion formally state to this Court whether or not, unless enjoined, he intends to proceed to the end of collecting said taxes to prevent the collection of which this suit seeks injunction;

(c) That this Court order that said Charles D. Redwine be substituted for said Downing Musgrove as appellee in this case, unless said Charles D. Redwine, in his response to this motion, disavows any intent to proceed to the end of collecting said taxes;

(d) That if, in his response to this motion said Charles D. Redwine does disavow any intent to proceed to the end of collecting said taxes, or if for any other reason this Court concludes that said substitution cannot be made, this Court, in pursuance of its policy to give such direction as justice may require to cases which for any reason have become moot, (*Shaffer* v. *Howard, Auditor of The State of Oklahoma et al.*, supra, 249 U. S. 200, 201; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, 36; *Walling, Administrator of Wage and Hour Division, U. S. Department of Labor*, v. *James V. Reuther, Inc.*, 321 U. S. 671, 676, 677; *Brownlow et al.*, v. *Schwartz*, 261 U. S. 216, 218, 219; *Duke Power Co. et al.* v. *Greenwood County, S. C. et al.*, 299 U. S. 259, 267; see particularly new Title 28, United States Code, Section 2106)

reverse the judgment of said State Supreme Court erroneously holding that this is a suit against the State, and remand said suit to said State Supreme Court with direction that it order the Superior Court of Fulton County, Georgia, to dismiss said suit as moot,—so that said judgment of said State Supreme Court, erroneously holding that this is a suit against the State, may not bar appellant from resisting any future effort on the part of said Charles D. Redwine, or any successor in office to him, to collect said taxes under color of said laws which appellant contends are unconstitutional as to it. (Appellant's statement as to jurisdiction and brief in opposition to motion to dismiss or affirm make plain that appellant's *only* remedy for contesting taxability is a suit in equity against the Commissioner as a wrongdoer, and that, if the judgment of said State Supreme Court remains outstanding, any future suit to prevent the collection of said taxes brought against said Charles D. Redwine, or any successor in office to him, as a wrongdoer would be held by said State Supreme Court likewise to be a suit against the State and not maintainable since such a suit would be in all essential respects identical with this suit.)

(e) That should this Court for any reason decline to allow the substitution and to deal with this case on the merits, it in terms provide that appellant's constitutional objections are saved. See *Republic Natural Gas Co.* v. *The State of Oklahoma et al.*, U. S. , 68 S. Ct. (Adv.) 972, at bottom of page 978.

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APPENDIX I.

Survival of Suits By or Against Public Officers.

No. 287.

An Act To provide for the survival of suits commenced by or against public officers in their official capacity in favor of or against their successors in office in the event of death, removal, resignation or expiration of the term of such officers; to provide the procedure in such case; to provide that the provisions of this Act shall apply to pending litigation; to restrict the application of this Act; and for other purposes.

Be it enacted by the General Assembly of Georgia and it is hereby enacted by authority of same:

Section. 1. That when any suit shall have been commenced by or against a public officer of this State in his official capacity and relating to the present and continuing duties of such office, the same shall in the event of the death, resignation, removal or expiration of the term of such officer while the suit is pending in the trial court and courts of review, survive in favor of or against his successors in office.

Section 2. In such event the successor in office shall be made a party upon motion either in term time or vacation in whatever court the case shall be pending at the time, of which he shall be given reasonable notice. When the successor shall have been made a party in accordance with this Act, the case shall thereupon proceed as if no change of parties had been made, provided that it shall be within the discretion of the court to allow the successor in office such time as he may deem necessary to appear, plead or otherwise proceed with such case.

Section 3. The provision of this Act shall apply to suits pending on the date of its approval, including all such actions that have not been formally dismissed even though the death, removal, resignation or expiration of the term

of such public officer may have occurred prior to the date of the approval of this Act.

Section 4. The provisions of this Act shall not apply to actions against officers for damages on account of tortious acts committed by such officer colore officii, which survives against such officer or his personal representatives, notwithstanding the death, resignation, removal or expiration of the term of such officer.

Section 5. The provisions of this Act shall relate only to suits commenced by or against State officers in their official capacity and shall not relate or apply to suits commenced by or against municipal, district, or county officers.

Section 6. All laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved March 27,* 1941.

(Copied from Georgia Laws 1941, pp. 516 et seq.)

*The original Act in the Georgia Secretary of State's office shows March 20 as date of approval.

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